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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

JAMES S. PATTESON, JR.,
Petitioner,

vs.

V. J. DEVINE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review a judgment entered in this cause on the 29th of March, 1957 and an order overruling a petition to rehear on the 30th day of April, 1957.

OPINIONS BELOW.

This case was not reported in the District Court and sufficient time has not elapsed for the opinions of the Court of Appeals to be reported.

We are appending the opinion of the District Judge, Marion S. Boyd, which was rendered when respondent's motion for a new trial and petitioner's motion for a judgment N. O. V. were each overruled.

This case was heard by Judges Allen, Stephens (9th Circuit), and Miller, Circuit Judges. The majority opinion by Judges Allen and Stephens was rendered on the 29th of March, 1957 and a dissent by Judge Shackleford Miller was filed on the same day. A petition to rehear was overruled by the majority, consisting of Allen and Stephens, with a dissent by Judge Miller. The opinions of the Court and of the dissenting Judge are appended.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A., Section 1254.

QUESTIONS PRESENTED.

1. Does a Federal Appellate Court have authority under the Seventh Amendment to the United States Constitution to set aside a jury verdict for inadequacy in a common law action for malicious prosecution where there is no error of law, all facts in support of the verdict being disputed, and the District Judge in the exercise of his discretion having approved the verdict?

2. May a Federal Appellate Court set aside a jury verdict and judgment rendered thereon in a common law action for malicious prosecution for inadequacy of com-

pensatory damages and reverse for the assessment of compensatory damages only, and affirm the same verdict and judgment as to liability and punitive damages where the verdict was entire, was based upon conflicting evidence, was not affected by any error of law, and a motion for a new trial was overruled by the Trial Court?

3. May a Federal Appellate Court set aside a jury verdict and judgment for compensatory damages because of inadequacy alone where applicable state law authorizes the jury to mitigate damages in accordance with the facts and circumstances of the case?

4. Does an indictment by a Federal Grand Jury show probable cause as a matter of law in a malicious prosecution case where there is no evidence that the indictment was based upon false swearing, concealment of facts or other improper conduct of the party sought to be charged?

CONSTITUTIONAL PROVISION INVOLVED.

This case involves a violation of the Seventh Amendment to the Constitution, which is as follows:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE.

The respondent, plaintiff below, brought a common law action for malicious prosecution against the petitioner, the defendant below, which arose under Tennessee law.

Jurisdiction was based on diversity of citizenship and the amount in controversy exceeding $3,000.00.

Respondent was indicted by the Federal Grand Jury for use of the mails in interstate transportation and use of instruments of transportation and communication in interstate commerce in an alleged conspiracy to defraud petitioner and others in violation of Title 18 U. S. C., Sec. 371, Sec. 1341, and 15 U. S. C., Secs. 77q (a), (1) and 77c (a).

Respondent was tried and acquitted.

Petitioner made the original complaint to the United States District Attorney, testified before the Grand Jury, and testified upon the trial of the criminal case.

After Respondent was acquitted this action was filed for malicious prosecution. The respondent alleged in his complaint the facts above stated and that petitioner "maliciously, intentionally and without just cause" stated to the United States District Attorney that respondent had violated certain laws of the United States and thereafter testified to such statements before the Grand Jury (3b through 5b). There was no allegation that the petitioner testified falsely before the Grand Jury, procured false testimony through others, withheld material evidence or was guilty of any fraud or improper contrivance in obtaining the indictment.

Petitioner's answer put in issue every material allegation of the complaint (6b, 7b).

Petitioner then pled specially that probable cause existed in the case (7b through 9b), and that he acted on the advice of the United States District Attorney and representatives of the Federal Bureau of Investigation and Securities and Exchange Commission (10b).

Respondent testified that he and his associate, Snakard, representing themselves and associates called the Devine group, met petitioner and others at Brownwood, Texas, and showed them certain oil leases and oil and gas wells that they claimed to own together with a gasoline plant at

Salem, Illinois (11b through 14b). This showing resulted in a preliminary agreement to organize a joint venture known as Padre Petroleum Company (Exhibit 3, 128b through 130b).

The understanding was that respondent and his associates would furnish the gasoline plant, then located at Salem, Illinois, and the oil and gas leases in Texas and that petitioner and his group would contribute cash which would be used for transporting and re-erecting the gasoline plant in Texas and developing the leases for the joint benefit of both groups (16b and 17b). This preliminary agreement was made on December 4, 1950 (20b).

Thereafter a formal contract was prepared under direction of respondent and William F. Snakard (Exhibit 4, 131b). On December 18, 1950, respondent and William F. Snakard left Kansas City, Missouri, with the formal contract in their possession for the purpose of circulating it among the prospective joint adventurers for signatures and for the collection of the cash to be contributed by petitioner and his group (20b). Respondent and Snakard for this purpose travelled to St. Louis, Missouri (21b), Memphis, Tennessee (23b), and Earle, Arkansas (23b). They collected on this trip checks representing $67,500 (22b through 25b).

From the cross-examination of the respondent, it was shown that respondent and his associate Snakard went to Evansville, Indiana, on December 19, 1950, to attempt to purchase the gasoline plant which they had represented that they owned and had agreed to furnish to the joint venture and trusteeship (26b). Respondent was to pay $50,000 for the plant which was to be discharged by paying $15,000 in cash and executing a $35,000 mortgage (32b). Snakard gave a $15,000 check as the down payment, which was dishonored for insufficient funds (37b, 38b, 39b). Another check was given on the trust funds

by Snakard which was not accepted by the owner of the plant because it had been sold to others (38a through 40a). On January 6, 1951, respondent learned that the gasoline plant had been sold to others and that he and his group could not possibly acquire it and comply with the agreement by furnishing it to the joint venture (43b). Respondent testified that he did not notify petitioner, and his group, of the failure to acquire the plant but permitted his associate Snakard as Trustee to continue to disburse the funds of the joint venture (44b, 45b).

Respondent testified that in February, 1951, he took two checks totalling $8,000, drawn by William F. Snakard as Trustee on the trust funds, and went to Webb City, Missouri, to purchase certain leases from a Dr. Greggory (50b). Respondent admitted that he and his group had agreed to contribute these leases to the joint venture (60b and 61b). Respondent and his group contracted to furnish certain leases known as the United North and South Leases (63b). In spite of this contract, trust funds to the extent of $13,500 were used to purchase these leases by checks drawn by William F. Snakard as Trustee (65b, 67b). Respondent concealed that this was an illegal and wrongful act (69b, 70b).

On January 17, 1951 Snakard as Trustee paid respondent $1,000 by check drawn on trust funds reportedly covering the dismantling of the gasoline plant at Salem, Illinois, which respondent and his group had agreed to furnish but had never owned (72b). Although this check was endorsed and cashed by respondent, he denied any knowledge of it in response to an interrogatory propounded under Rule 31 (76b). Other instances of the misappropriation of funds were shown in the evidence during the months of January and February of 1951.

In analyzing this evidence the Court of Appeals stated: "The evidence in the instant case was in conflict upon the

principal claims of misrepresentation. We do not discuss them because the jury found for plaintiff and necessarily found that the misrepresentations alleged had not been made and the fraudulent acts charged had not been performed."

There was evidence that the fraud of respondent and his associate was discovered in March, 1951, with the result that respondent and his group turned over a twenty-nine per cent interest in the joint venture to petitioner and his group; and that in July, 1951 petitioner threatened Snakard with arrest and prosecution for fraud unless an additional fifteen per cent of the joint venture was surrendered by the Devine group.

Petitioner reported the matter to the United States District Attorney at Memphis in late 1953. A conference was held between petitioner, the District Attorney, F. B. I. agents and others prior to the indictment (99b). Following this conference, a post office inspector and a representative of the Securities and Exchange Commission, investigated the matter in Earle, Arkansas, Memphis, Tennessee, Fort Worth, Brownwood, and Dallas, Texas, and interviewed twenty-five or thirty persons (104b). These investigators of governmental agencies reviewed the Padre Petroleum Company records (105b). They interviewed Dr. Devine and many others. (106b).

After the investigation, a conference was held with several of the Assistant United States District Attorneys at Memphis, Tennessee, to review the results of the investigation (116b). The matter was then presented to the Grand Jury. Ten witnesses testified and the indictment was returned (117b).

Petitioner moved for a directed verdict on the ground that the indictment itself constituted prima facie evidence of probable cause and there was no evidence that it was

obtained by any improper conduct (Record 159b through 162b). This motion was overruled.

Respondent testified that he was a physician and surgeon (7a). He stated that after the indictment was returned against him he employed these lawyers: Mr. John S. Marley of Kansas City, Missouri, and paid him $450 (8a, 9a); Mr. Lewis Donleson of Memphis, Tennessee, and paid him a $200 fee (10a); Mr. Carl Rizley of Sayre, Oklahoma, and paid him a $5,000 fee (12a); the firm of Wilkes & Haynes of Memphis, Tennessee, and paid them a $9,500 fee (12a); and Mr. Robert M. Murray of Kansas City, Missouri, and paid him a $3,000 fee. (12a, 13a). Respondent's testimony was the only evidence as to these fees. There was no evidence that the fees were reasonable.

All issues were submitted to the jury under a charge which was unexcepted to. After requesting additional instructions as to liability, the jury returned a verdict for the respondent for $500 compensatory damages and $1.00 punitive damages, and judgment thereon was entered (163b).

Respondent moved for a new trial. The only ground necessary to notice here is that the verdict in the amount of $500 compensatory damages is so wholly insufficient and inadequate as to show the jury failed and neglected to consider the elements of damage shown by the undisputed evidence offered by plaintiff and that the verdict was the result of passion, prejudice, partiality and compromise on the part of the jury. (22a through 24a). It was not claimed that there was any error committed in the admission or rejection of evidence, the charge of the Court, or in connection with any other matter which occurred during the course of the trial.

Petitioner moved for a judgment notwithstanding the verdict of the jury based upon his motion for a directed verdict (24a through 27a).

The trial court overruled both motions, saying:

"The Court: I say if this is a discretionary matter for the Court, the Court exercises its discretion in overruling the motion. Generally speaking, the Court has some discretion in dealing with motions for new trial, and you have put this up to the Court as being a matter under which there is a positive obligation on the Court——.

Mr. Murray: As a matter of law there is.

The Court: As a matter of law——

Mr. Murray: Yes, sir.

The Court: ——to grant you a new trial. And I am simply saying that as a matter of law you are not entitled to the relief you seek here, nor are you entitled to have the Court in its discretion grant a new trial.

Mr. Murray: Then the result of it is both motions are overruled, then.

The Court: Well, with respect to Mr. Porter's motion, the Court thinks the case was properly submitted to the jury, and that it was a question for the jury, and the jury's verdict settled the matter" (Record 168b).

Both parties appealed.

OPINION OF THE COURT OF APPEALS.

The majority of the Court of Appeals held that there was evidence to sustain liability and that petitioner's motion for a directed verdict was properly overruled. In arriving at the conclusion that the respondent had carried the burden resting upon him of showing an absence of probable cause, the Court inferred an absence of probable cause from evidence of malice. The majority then reasoned, after an examination of the facts, that "since the verdict was less than the amount of the loss shown

and not disputed, the motion for a new trial should have been granted." The majority did not disturb the verdict for punitive damages of $1.00, holding that the amount of punitive damages was within the discretion of the jury. The majority then found that the issues of liability, compensatory damages and punitive damages were separable, ordered a reversal of the case for assessment of compensatory damages only and permitted the verdict to stand as to punitive damages and liability.

Circuit Judge Miller dissented, saying:

> "It seems clear to me that this was a compromise verdict, that most of the jurors in this case were not in favor of returning a verdict for the plaintiff, and would not have agreed to a verdict for the plaintiff if it would result in awarding to him any substantial amount. . . . In the present case it is at least probable that the questions of liability and the amount of damages were, as a practical matter, so closely interwoven that if a new trial is to be granted, it should be granted in its entirety and not limited to the question of damages only."

A petition to rehear was filed citing applicable Tennessee authorities to the effect that proof of malice of the most express character would not authorize the Court to infer an absence of probable cause, and citing Tennessee authorities which held that in a case of this nature all of the circumstances may be shown in mitigation of damages and that the jury may mitigate the damages in accordance with these circumstances.

The following order was filed and entered on this petition to rehear:

> "The petition for rehearing is denied. Judge Miller is of the opinion that the petition should be granted."

ARGUMENT.

I.

The Courts of Appeals Are in Conflict as to Their Right to Review a Jury Verdict and Judgment for Excessiveness or Inadequacy.

This was a common law action for malicious prosecution and the burden of proof was on the respondent, plaintiff below; to make out his case by a preponderance of the evidence on every material issue. The recognized conflicts in the evidence gave the jury the right to believe either all, a portion, or none of the respondent's evidence either as to liability or damages. The risk of non-persuasion resting upon respondent applied equally to liability and to the damages sustained.

The evidence of the respondent was conflicting and was so found by the Court of Appeals. The Court reasoned, however, that, since respondent's testimony as to expenses incurred was not contradicted by direct testimony bearing on these expenses, these facts appeared as a matter of law and that the jury was bound to accept and to include this evidence of expense if any verdict was returned for respondent.

In **Morgan v. Tenn. Central Ry. Co.**, 31 Tenn. App. 409, 422-423, 216 S. W. 2d 32, 37-38 (1948), the rule applicable to this situation is stated:

> "If a witness is discredited by the jury on one material issue about which there is a conflict in the testimony, it is within the province of the jury to discredit the witness on any or all other material issues in the case, although there is no conflict in the evidence as to such other issues. The rule is based upon the maxim, 'false in one, false in all'; and upon the

fundamental principle of evidence that the jury must determine the credibility of witnesses, not the judge. Frank v. Wright, 140 Tenn. 535, 205 S. W. 434; Wright v. Bridges, 16 Tenn. App. 576, 65 S. W. (2d) 265.

"We think this rule should be further extended so as to protect the constitutional right of trial by jury. We hold the correct rule to be: Several facts must be proved by a plaintiff to make out his case. He relies upon the testimony of one witness to prove the facts. That witness is contradicted by the evidence on one material issue, but is not contradicted on the other issues. The trial judge has no constitutional right to state to the jury that other facts about which there is no contradictory evidence are proved. Frank v. Wright, supra; Wright v. Bridges, supra; Ivey v. Hodges, 23 Tenn. 154, 155; Brenizer v. Nashville C. & St. L. Ry., 156 Tenn. 479, 3 S. W. (2d) 1053, 8 S. W. (2d) 1099; Haskins v. Howard, 159 Tenn. 86, 97, 16 S. W. (2d) 20; Osborn et al. v. City of Nashville, 182 Tenn. 197, 201, 185 S. W. (2d) 510, 512."

The Federal cases are to the same effect.

Norfolk & Western RR. Co. v. McKenzie, 116 F. 2d 632 (6th Cir.);

Victory Sparkler & Specialty Co. v. Latimer, 53 F. 2d 3 (8th Cir.).

In **Norfolk & Western R. Co. v. McKenzie**, supra, the Court stated the rule concisely:

"Under our judicial system the jury alone is charged with forming a conclusion as to the truth of the testimony offered." (Citing many cases.)

A new trial could not be granted on this record at common law as it existed at the time the Seventh Amendment was adopted.

In **Parsons v. Bedford, Breedlove & Robeson**, 28 U. S. 433, 7 L. Ed. 732, 737, this Court, after quoting the Seventh Amendment, said:

> "... This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. The Judiciary Act of 1789, ch. 20, sec. 17, has given to all the courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.' And the appellate jurisdiction has also been amply given by the same act (secs. 22, 24) to this court to redress errors of law; and, for such errors to award a new trial, in suits at law which have been tried by a jury."

In **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U. S. 474, 77 L. Ed. 439, 443-444, this Court refused to set aside a judgment based upon a jury verdict for $1.00 which was admittedly less than the actual damages of the party. The Court said:

> "First. The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals. Its early formulation by this Court was influenced by the mandate of the Judiciary Act of 1789, which provided in Sec. 29 that there should be

'no reversal in either (circuit or Supreme) court on such writ of error . . . for any error in fact.' Sometimes the rule has been rested on that part of the Seventh Amendment which provides that 'no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.' More frequently the reason given for the denial of review is that the granting or refusing of a motion for a new trial is a matter within the discretion of the trial court."

We question the right of any Federal Appellate Court to review any judgment based upon the verdict of the jury for inadequacy or excessiveness where there is no error of law appearing in the record as in the case at bar and do not believe that the decisions of this Court have recognized that right.

A conflict has arisen among the various circuits as to when a Federal Appellate Court should review a judgment based upon a jury verdict for inadequacy or excessiveness.

In the majority of the circuits the common law rule adhered to is that the granting or denial of a motion for a new trial for inadequacy or excessiveness of the verdict rests in the discretion of the Trial Court and in the Trial Court alone. Proceeding from this premise most circuits have not disturbed a judgment because of the excessiveness or inadequacy of a judgment unless the Trial Court has abused his discretion.

Taylor v. Virginia Metal Products Corp. (4th. Cir.), 204 F. 2d 457;

Atlanta Greyhound Corp. v. Lyon (4th Cir.), 107 F. 2d 157;

Rankin v. Shayne Bros., Inc., (Dist. of Col. Cir.), 234 F. 2d 35;

Hulett v. Brinson (Dist. of Col. Cir.), 229 F. 2d 22;

Miller v. Tenn. Gas Transmission Co. (5th Cir.), 220 F. 2d 434;

Marsh v. Illinois Central R. Co. (5th Cir.), 175 F. 2d 498;

Home Ins. Co. of New York v. Tydal Co. (5th Cir.), 157 F. 2d 851;

Smyth Sales Co. v. Petroleum Heat & Power Co. (3rd Cir.), 141 F. 2d 41.

In the 2nd Circuit this basis for reviewing jury verdicts has been repudiated and an entirely different rule adopted.

In **Miller v. Maryland Casualty Co.**, 40 F. 2d 463, 465, the 2nd Circuit in an opinion by Judge Learned Hand rejected the concept that Federal Appellate Courts can review a jury verdict where there has been "an abuse of discretion," and said:

> "... That is an impracticable rule, unless confined as it has always been confined save for Cobb v. Lepisto [6 F. (2) 128]. The trial judge decides what verdict is within the bounds of reasonable inference from the evidence. That is a question which we can consider as well as he, and which we do upon his direction of a verdict. But by hypothesis we are not to be allowed to do that; we must come at the matter at one remove, and apply the same test to the judge's decision that he applies to the jury's. We must in effect decide whether it was within the bounds of tolerable conclusion to say that the jury's verdict was within the bounds of tolerable conclusion. To decide cases by such tenuous unrealities seems to us thoroughly undesirable; parties ought not to be bound by gossamer strands; judges ought not to engage in scholastic refinements."

In that same opinion the Court catalogued the cases wherein appellate courts have granted new trials for excessive or inadequate verdicts as follows:

1. Cases where the jury gave only nominal damages, that is, where they did not attempt to appraise the plaintiff's loss at all;

2. Cases where the jury's verdict was less than the amount of the loss which the defendant did not dispute;

3. Or cases where damages were not involved.

This classification was adopted and approved by the 6th Circuit in **Reisberg v. Walters**, 111 F. 2d 595. In that case plaintiff sued for personal injuries. The amount of special damages was stipulated and the jury returned a verdict for less than the stipulated amount. It was obvious that the plaintiff recovered nothing for pain and suffering. The Court held that the facts of the case brought it within the second classification above listed, and reversed the Trial Court for failure to grant a new trial and remanded the case. The Court quoted with approval from **Dimick v. Schiedt**, 293 U. S. 474, 486, 79 L. Ed. 603, 611, 95 A. L. R. 1150, as follows:

> "'Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages.'"

Therefore, two different rules are being applied by the various circuits in the review of judgments based upon jury verdicts where these judgments are claimed to be either inadequate or excessive. At present, if a person happens to be sued in the 2nd or 6th Circuit, the jury verdict against him would stand on appeal unless it happened to fall in one of the three categories listed in **Reisberg v. Walters**, supra. If, however, the same trial occurred in another circuit, the jury verdict would stand

unless the Appellate Court concluded that the Trial Court had abused his discretion in overruling a motion for a new trial.

If Federal Appellate Courts can review jury verdicts for inadequacy or excessiveness, then such right should be clearly defined and restricted so as to be circumscribed by the inhibition contained in the Seventh Amendment. This constitutional right should not mean one thing in one jurisdiction and something entirely different in another.

In spite of this conflict in the authorities, the jury verdict in the case at bar should not have been disturbed because **under either rule** this verdict was based upon conflicting evidence which the jury could believe or not in its discretion. Thereafter the Trial Judge expressly exercised his discretion and approved the verdict of the jury. Regardless of whether the abuse of discretion rule is applied or whether the categories of cases adopted by Judge Hand is applied, this jury verdict should not have been disturbed because this case does not come within either classification.

II.

The Court of Appeals Has Set Aside a Part of an Entire Jury Verdict and Judgment in Violation of the Seventh Amendment and Applicable Decisions of This Court.

It is recognized that modern authority permits an Appellate Court in proper cases to reverse and to remand for the assessment of damages only, but this has not been done in any reported case similar to the one at bar.

No claim is made that there was any error of law committed either in the admission or rejection of evidence, the charge of the Court or any other matter. Respondent's entire case rests on conflicting evidence. The Trial Court would have been in error had he charged the jury as a matter of law that the jury could not return a verdict for

the plaintiff in any amount less than $500. Yet the Court of Appeals has held that the jury verdict of $500 was erroneous as a matter of law because of its amount and has reversed for the assessment of damages only.

In **Gasoline Products Co., Petitioner, v. Champlin Refining Co., Respondent,** 283 U. S. 494, 500-501, 75 L. Ed. 1188, 1191, Mr. Justice Stone stated the rule with reference to the granting of a partial new trial, such as was granted in this case, to be:

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. See Norfolk S. R. Co. v. Ferebee, 238 U. S. 269, 274, 59 L. ed. 1303, 1306, 35 S. Ct. 781; American Locomotive Co. v. Harris, 152 C. C. A. 221, 239 Fed. 234, 240; Simmons v. Fish, supra (210 Mass. 568, 97 N. E. 102, Ann. Cas. 1912D, 588); McBride v. Huckins, 76 N. H. 206, 213, 81 Atl. 528; General Motors Truck Co. v. Shepard Co., 47 R. I. 153, 156, 130 Atl. 593; Lefebvre v. Central Vermont R. Co., 97 Vt. 342, 358, 123 Atl. 211. Here the question of damages on the counter-claim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial. See Simmons v. Fish, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588. There should be a new trial of all the issues raised by the counter-claim."

Respondent's brief in the Court of Appeals states:

> "In conclusion we respectfully submit the evidence of plaintiff on the specific damage and attorneys' fees and traveling expenses was uncontradicted, the jury was properly instructed to allow plaintiff for such damage if they found in favor of plaintiff, the verdict is grossly inadequate and shows on its face that the

jury failed to follow the Court's instructions **and compromised liability and damages to prevent a disagreement** . . ." (Emphasis added.)

Judge Miller in his dissenting opinion in the case at bar said:

> "It seems clear to me that this was a compromise verdict, that most of the jurors in this case were not in favor of returning a verdict for the plaintiff, and would not have agreed to a verdict for the plaintiff if it would result in awarding to him any substantial amount. . . . In the present case it is at least probable that the questions of liability and the amount of damages were, as a practical matter, so closely interwoven that if a new trial is to be granted, it should be granted in its entirety and not limited to the question of damages only. Schuerholz v. Roach, 58 F. (2d) 32, 34, C. A. 4th, cert. denied, 287 U. S. 623; Southern Railway Co. v. Madden, 235 F. (2d) 198, 204, C. A. 4th. Unless it **clearly** appears that the issue of damages was distinct and separable from the issue of liability, a new trial on the issue of damages alone should not be granted. Gasoline Products Co. v. Champlin Refining Co., 283 U. S. 404, 500; Thompson v. Camp, supra, 167 F. (2d) 733, 734, C. A. 6th." (p. 9.)

Both Judge Miller and respondent's counsel concluded this jury's verdict was a compromise in that damages were mitigated because of the doubtful liability.

In **Mutual Benefit Health & Accident Ass'n v. Thomas**, 123 F. (2d) 353, 356 (4th Cir.), the Court said:

> "If it should be conceded that the jury failed properly to respond to the question of damages, that part of its verdict could not be set aside unless it were certain that the error which resulted in inadequate damage did not affect the other issues. Even if the question involved were the right of the court to grant a

new trial as to damages alone, that should not be done where there is ground for a strong suspicion that the jury awarded the inadequate damages to plaintiff as a result of a compromise involving the question of liability. Simmons v. Fish, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588; Doody v. Boston, etc., R. R., 77 N. H. 161, 89 A. 487, Ann. Cas. 1914C, 846. Thus, in Moulton v. Langley, 81 N. H. 138, 124 A. 70, 71, the court said: 'The misconduct of a jury in returning a verdict for an unreasonably small sum, in disregard of the evidence and of the instructions of the court, is presumed to extend to the issue of liability in the absence of satisfactory evidence of facts occurring at the trial from which it can be found that it was due to other causes.' "

See also **Southern Ry. Co. v. Madden**, 235 F. (2d) 198, 204 (4th Cir.). In the latter case the jury on the first trial returned a verdict for the plaintiff for $5,000. The Trial Judge allowed this verdict to stand insofar as it established liability on the part of the defendant but set it aside insofar as it fixed the amount of damages and awarded a new trial on the issue of damages alone. On the new trial so awarded the jury returned a verdict in the amount of $75,000. On appeal the judgment was reversed and a new trial ordered on all issues, the Court saying:

". . . The subsequent trial on the issue of damages, resulting in a verdict of $75,000, merely serves to emphasize that the verdict of $5,000 was not merely totally inadequate but could have been rendered only as a sympathy or compromise verdict and could not reasonably have been rendered if the jury had found real liability on the part of defendant. To allow such a verdict to stand as establishing liability while granting a new trial on the issue of damages alone is, in our opinion, not sustainable as a sound exercise of discretion."

In **Rankin v. Shayne Brothers, Inc.**, 234 F. (2d) 35, 37 (Dist. of Col.), the Court said:

> "We refer also to Dunn v. United States, 284 U. S. 390, 394, 52 S. Ct. 189, 191, 76 L. Ed. 356, where it is said that though the verdict, as in the case at bar, possibly may have been the result of compromise, or of a mistake on the part of the jury, 'verdicts cannot be upset by speculation or inquiry into such matters.' Compare, however, such cases as Wallace v. City of Rock Island, 323 Ill. App. 639, 56 N. E. 2d 636."

If the procedure in the case at bar becomes a precedent, a party's right to a jury trial as guaranteed by the Seventh Amendment will in such cases become a mockery. For example, the jury in the case at bar had a right under the law to disbelieve this plaintiff's testimony as to damages because of the many conflicts in his evidence in connection with questions of liability. The jury had a right to disbelieve plaintiff's testimony as to damages because of his interest in the case, his evasiveness, his manner and demeanor on the witness stand, and many other factors well recognized in determining the credibility of a witness. Also it is apparent that the issues of liability and damages were not separable but were inextricably interwoven.

In **Dimick v. Schiedt**, supra, this Court reviewed the common law as it existed at the time of the Seventh Amendment and concluded that while at that time there was authority for the suggestion of a remittitur, there was no authority to support an additur and that the Court's attempt to add to the jury verdict was, therefore, unconstitutional. The Court said (79 L. Ed. 611):

> ". . . When therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial; how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may,

by assessing an additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess."

The action of the Court of Appeals in the case at bar accomplishes by indirection that which this Court has specifically disapproved. In effect, the opinion of the Court of Appeals directs a jury to find damages in an amount in excess of $500 which just as effectively increases the verdict as an additur by the Court would have done. See also **Mutual Benefit Health & Accident Ins. Co. v. Thomas**, 123 F. 2d 353 (8th Cir.); **United States v. Kennesaw Mountain Battlefield Ass'n**, 99 F. 2d 830 (5th Cir.).

III.

The Court of Appeals Has Reviewed a Jury Verdict and Judgment Contrary to Applicable State Law.

Under the decisions of the Courts of Tennessee the verdict of the jury in this case was not inconsistent as a matter of law with the facts of the case nor was the issue of compensatory damages separable from the issue of liability.

In **Woodfolk v. Sweeper**, 21 Tenn. 88, 96, decided by the Tennessee Supreme Court at the December Term, 1840, the plaintiff sued for damages for false imprisonment. The plaintiff alleged that the defendant had wrongfully and illegally detained him in slavery for a period of approximately three years, during which time defendant compelled plaintiff to labor for him as a slave, and that plaintiff was

compelled to expend large sums in prosecuting suits for the recovery of his freedom, to-wit, attorneys' fees, witness fees, and other necessary expenses. The evidence sustained these allegations and the case was submitted to a jury and decided in favor of the plaintiff. On appeal the defendant assigned as error the charge of the Trial Court that the plaintiff was entitled to recover as damages the value of his services for the time he was wrongfully imprisoned, the necessary expenses incurred in recovering his freedom and a reasonable allowance for his attorney fees. Upon this assignment Mr. Justice Turley, speaking for the Court, stated:

> " . . . The error consists in the use of the word 'entitled,' which imports a legal right, and leaves the jury no discretion as to the amount of damages, but really makes it a matter of account, which, we have just said, it cannot be. It must stand, like all other cases of like kind, subject, for the amount of damages, to the discretion of the jury. It was proper in evidence to show the time plaintiff was falsely imprisoned, the value of his labor, the expenses he had been put to in obtaining his freedom, etc. And the judge should have said to the jury that these were legitimate things to be considered of by them in assessing the damages. . . . Inasmuch as proof upon these points could have been heard in aggravation of damages, and the jury might have given the whole, the court determined it should be done upon the case agreed, and the judgment was given accordingly. But this is no determination that a jury is bound to make a full allowance. This defendant may introduce circumstances of mitigation, viz., his ignorance of the plaintiff's right to freedom, his uniform kindness to him in sickness and in health, and many other things which the jury would have the right to take into consideration, and would often pre-

vent their giving what might otherwise be considered the full measure of justice. The case will be reversed and remanded for a new trial."

In **Daniel v. Giles**, 108 Tenn. 242, 244, 66 S. W. 1128, 1129, plaintiff sued for assault and battery and recovered a judgment. Defendant appealed. The issue was whether or not circumstances could be shown in mitigation of damages. The Court said:

"The Court then proceeds to instruct the jury that if they find for the plaintiff under the charge, he would be entitled to recover for mental and physical suffering, loss of time, medical expenses, etc. The Court failed to instruct the jury that any insulting language or provocation offered by the plaintiff at the time of the assault should be considered in mitigation of damages. On the contrary, the consideration of the provocation for any purpose is entirely excluded by the Court in his hypothetical statement of facts, and the jury were instructed that unless the proof showed the defendant acted in self-defense at the time of the assault, the plaintiff would be entitled to recover just such damages as he had sustained. This is an affirmative error, for which the judgment must be reversed and the cause remanded" (p. 244).

To the same effect are the cases of **Jacaway v. Dula**, 15 Tenn. 82, and **Chambers v. Porter**, 45 Tenn. 273-280.

In **Deaderick v. Smith**, 33 Tenn. App. 151, 159, 230 S. W. 2d 406, 410, the action was for false imprisonment, which is closely akin to malicious prosecution, and there was a judgment for the plaintiff alleged to be excessive. The Court said:

"It is insisted that the amounts of the verdicts are excessive. In cases of this kind the question of the amount of the verdict is peculiarly a question for the jury. There is no method of calculating the extent of

the damages in dollars and cents and the amount of the recovery should be left to the discretion of a jury subject to the approval of the trial judge, unless this amount is exorbitant and the result of passion, prejudice, or caprice on the part of the jury. Such does not appear in this case."

It follows from the foregoing that in intentional harm cases in the State of Tennessee the issue of liability is not separate and distinct from the issue of damages either compensatory or punitive. Therefore, the jury in the case at bar had the right and duty to consider all of the circumstances in determining both liability and damages. The verdict was not as a matter of law inconsistent with the facts contained in the record nor was the amount of this verdict for compensatory damages separable from the facts creating liability.

IV.

The Court of Appeals Failed to Apply Applicable State Law in Holding That an Indictment Failed to Show Probable Cause in a Malicious Prosecution Case.

The record in the case at bar shows that the defendant was indicted by a Federal Grand Jury at Memphis, after an extensive investigation had been made by the post office inspector and by representatives of the Securities and Exchange Commission and the Federal Bureau of Investigation in several states. Ten witnesses testified before the Grand Jury, including petitioner. There is no evidence in this record as to the substance of the testimony given by petitioner to the Grand Jury or that petitioner gave false information to the United States District Attorney or to the representatives of Federal Agencies investigating the charges against respondent.

There was evidence that after respondent's fraud was discovered, petitioner threatened respondent with prose-

cution for fraud unless respondent and his associates would reduce their interest in this joint venture. These threats took place in May, June and July, 1951. Petitioner reported the matter to the United States District Attorney in late 1953 and the indictment was returned on February 16, 1954 (7a).

The Court of Appeals held:

> "Since defendant for a considerable period, as shown by the uncontradicted testimony, accepted the activities of plaintiff and Snakard in Padre's affairs without any claim of fraud and later extorted from Snakard and plaintiff practically their entire interest by threats of prosecution, the inference of good faith and probable cause arising from the indictment was rebutted. The question whether defendant acted in good faith in pressing the indictment in 1954, so long after the civil liability of plaintiff, if any, at least in large degree, had been settled, became a question of fact. Under Tennessee law defendant's failure to testify in the malicious prosecution case warranted an inference of bad faith and want of probable cause. Bankhead v. Hall, 238 S. W. (2d) 522, 527, 34 Tenn. App. 412. The District Court did not err in submitting this issue to the jury" (pp. 4-5).

The evidence of threats of prosecution constituted evidence of malice, but from this malice the Court of Appeals was in error in inferring an absence of probable cause.

34 **A. J.**, Malicious Prosecution, 66;
54 **C. J. S.**, Malicious Prosecution, 35;
Dawes v. Starrett, 82 S. W. 2d 43 (Mo.);
Memphis & Gayoso Gas Co. v. Williamson, 56 Tenn. 314;
Levy v. Chasnoff, 283 N. Y. S. 891.

The universal rule on this point is well stated in **Dawes v. Starrett**, supra (p. 45), as follows:

". . . The prevailing rule is that the finding and return of the indictment by the grand jury is prima facie evidence of and establishes probable cause unless the plaintiff in the action for malicious prosecution rebuts the presumption by proof that the defendant in the action for malicious prosecution obtained or induced the indictment by false testimony before the grand jury, or by intentionally withholding or concealing from the grand jury pertinent facts necessary to a full and fair investigation which were known to defendant or which he could by due diligence have ascertained, or by other improper or fraudulent means, or by showing that defendant, though he did not believe the accused to be guilty, obtained or procured the indictment against him."

There was no evidence in this record upon which a finding could be made that the indictment was based upon any false swearing or other improper conduct of petitioner and the Court of Appeals did not so find. Instead, the Court of Appeals inferred from evidence of malice the absence of probable cause.

In **Union Stockyards, Inc., v. Grissim**, 13 Tenn. App. 115, 127, the Tennessee Court of Appeals said:

". . . Malice, alone, however great, is insufficient. Want of probable cause cannot be inferred from malice, however great such malice may be, even 'the most express malice.' 38 C. J. 401-2; 1 Cooley on Torts, 3 Ed. 337; Kendrick v. Cypert, 10 Hump. 294" (p. 127).

To the same effect are the cases of **Kendrick v. Cypert**, 29 Tenn. 296, and **Wheeler v. Nesbit**, 16 L. Ed. 765, 768-769, 65 U. S. 544. In Wheeler v. Nesbit, supra, this Court said:

". . . Malice, alone, however, is not sufficient to sustain the action, because a person actuated by the plainest malice may, nevertheless, prefer a well founded accusation, and have a justifiable reason for the prosecution of the charge. . . .

"It is true, as before remarked, that want of probable cause is evidence of malice for the consideration of the jury; but the converse of the proposition cannot be sustained." (pp. 768-769).

The burden is upon the plaintiff to show the absence of probable cause. The indictment was prima facie evidence of probable cause and became conclusive unless it was shown to have resulted from some false swearing or other improper conduct of the defendant **before the Grand Jury.** The Court of Appeals has reasoned that the evidence of malice on the part of the petitioner which occurred in 1951, or **nearly three years before the indictment,** destroyed the presumption that resulted from proof of the indictment.

The only evidence in this record that bears on the defendant's activities in connection with the indictment and his appearance before the Grand Jury is in petitioner's answers to interrogatories which were read into evidence by the respondent and which negative any fraud or false swearing on the part of the defendant (Record 119-b through 122-b).

Wholly aside from the presumption arising from proof of the indictment is the evidence which came from respondent himself showing that he and his associate Snakard were indisputably guilty of certain acts of fraud in December, 1950 and January and February, 1951. The Court of Appeals did not discuss respondent's acts of fraud but held in effect that they were obviated or excused by the acts of the petitioner in dealing with the respondent after such fraud was committed and by the evidence of petitioner's malice.

In this situation the Court of Appeals found on the authority of **Bankhead v. Hall**, 238 S. W. 2d 522, 34 Tenn. App. 412, that the petitioner's failure to testify warranted an inference of bad faith and **want of probable cause.** We

concede that the failure of the petitioner to testify warranted an inference of malice because there was prima facie evidence of malice already in the record, but we earnestly disagree with the conclusion that the failure of the petitioner to testify furnished substantive proof of the absence of probable cause. The effect of petitioner's failure to testify is clearly shown by the case of **National Life & Acc. Insurance Co. v. Eddings**, 188 Tenn. 512, 520-521 (1949), 221 S. W. (2d) 695, 698. In that case the Supreme Court of Tennessee had this exact question before it, although not in a malicious prosecution case, and said:

> "The Court of Appeals is of the opinion that the inference arising from the failure of a party to produce available witnesses or from his failure to cooperate with his adversary in bringing pertinent facts before the Court, does not amount to substantive proof which can be substituted for a fact required to make out his adversary's case. To this we agree. The inference to be drawn from such conduct may well be a persuasive factor in the process of weighing and interpreting the testimony offered by the party who can produce evidence and fails to do so, but it cannot be treated as affirmative evidence of a fact otherwise unproved. Logic and precedent combine to establish this conclusion. 'The extent of a party's right to invoke his opponent's failure to call an available witness is merely to impair the value of the opponent's proofs and to give greater credence to the positive evidence of the party on any issue in which it is shown that the witness might have had knowledge.' 31 C. J. S., Evidence, sec. 156, p. 860. See also Milio v. Railway Motor Trucking Co., 257 App. Div. 640, 15 N. Y. S. (2d) 73.
>
> "'The presumption may be used to throw light on evidence already in; not to make evidence . . . No presumption or inference from the non-production of evidence is potent enough to supply independent evi-

dence of a fact which is wholly unproved by other evidence.' Jones' Commentaries on Evidence, sec. 97.

"A full annotation upon the subject appears in 70 A. L. R. 1326-1330. The cases there cited and the reason supporting them justify the adoption of the following statement quoted from American Jurisprudence and relied on by the Court of Appeals in this case:

"'It may be fairly implied from the cases that the presumption or inference arising from the failure of a party to produce available witnesses or evidence or to testify does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's case. . . .'" (pp. 520-521).

If the protection granted by the law by reason of an indictment can be so easily overthrown, every citizen will hesitate to make frank disclosures to prosecuting attorneys and grand juries because they will always be in constant jeopardy of a malicious prosecution case if the prosecution should fail.

CONCLUSION.

For the reasons stated we earnestly insist that this petition for certiorari should be granted.

Respectfully submitted,

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